Supreme Court, U.S.
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No. 08- 08-643

IN THE
Supreme Court of the United States

HENRY A. CANALES-MATAMOROS,

Petitioner,

v.

U.S. ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the uniform federal criminal definition for conviction of sexual abuse of a minor governs the deportation provision in Section 101(a)(43)(A) of the Immigration & Nationality Act of 1952 as amended (the "Act"), 8 U.S.C. § 1101(a)(43)(A) requiring removal of an alien convicted of sexual abuse of a minor?

Whether the rule of lenity or narrow construction should be applied to resolve an ambiguity in a deportation provision that is also part of a federal criminal statute?

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OPINIONS BELOW

The decision of the Court of Appeals is not officially reported but may be found at 2008 U.S. App. LEXIS 14721 (11th Cir. July 10, 2008) and appears in Appendix A to this Petition at App. 1a—6a. The decisions of the Board of Immigration Appeals ("BIA" or the "Board") and the Immigration Judge are not officially reported and appear in Appendix A to this Petition at App. 7a-11a and App. 12a-13a, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on July 10, 2008, and a timely petition for rehearing with a suggestion for rehearing *en banc* was denied on August 14, 2008. (App. 14a—15a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1227(a)(2)(A)(iii)

> Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. § 1101(a)(43)(A)

> The term "aggravated felony" means— murder, rape, sexual abuse of a minor.

8 U.S.C. § 1326

(a)(1) Subject to subsection (b), an alien who has been . . . removed, and thereafter

(2) enters. . . .

(b) . . . in the case of any alien. . .

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years or both.

18 U.S.C. § 2243—Sexual abuse of a minor or ward

(a) Of a Minor—Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal Prison, or in any institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who—

(1) has attained the age of 12 years but has not attained the age of 16 years; and

(2) is at least four years younger than the person so engaging;

or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

18 U.S.C. § 2246

As used in this chapter—

(2) The term "sexual act" means—

(A) contact between the penis and the vulva or the penis and the anus, and for the purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

18 U.S.C. § 3509(a)—Child victims' and child witnesses' rights

(8) the term "sexual abuse" includes the employment, use, persuasion, inducement, enticement, or coercion of a child to engage in sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children;

(9) the term "sexually explicit conduct" means actual or simulated—

(A) sexual intercourse, including sexual contact in the manner of genital-genital, oral-genital, anal-genital, or oral-anal contact, whether between persons of the same or opposite sex; sexual contact means the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person;

(B) bestiality;

(C) masturbation;

(D) lascivious exhibition of the genitals or pubic area of a person or animal; or

(E) sadistic or masochistic abuse;

N.C. Gen. Stat. § 14-2-2.1

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he (1) Willfully takes or attempts to take any immoral, improper or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire.

PRELIMINARY STATEMENT

At issue in this case is whether the uniform federal criminal definition for conviction of sexual abuse of a minor in 18 U.S.C. § 2243 should control a deportation provision requiring removal when an alien has been convicted of sexual abuse of a minor. That Congress premised the harsh penalty of deportation for conviction of an aggravated felony upon an actual conviction provides conclusive support for the view that the uniform federal criminal definition of sexual abuse of a minor should control, as, for example, the Ninth Circuit recently held in a unanimous *en banc* decision, *Estrada-Espinoza v. Mukasey*, 2008 U.S. App. LEXIS 21873 (9th Cir., Oct. 20, 2008). By contrast, the decision below sanctions reliance upon the definition of sexual abuse contained in a social welfare provision, 18 U.S.C. § 3509(a)(8), which simply does not define a criminal offense for which any one could ever be convicted. Similarly, both *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001) and *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001) fall in line with the decision below in upholding resort to 18 U.S.C. § 3509, while *Emile v. INS*, 244 F.3d 183

(1st Cir. 2001) would seem to endorse application of the federal criminal definition. In short, especially with *Estrada*, the Courts of Appeal are now clearly split on this issue.

This pronounced split among the Circuits not only creates divergent rules on imposing the harsh penalty of deportation, but also undermines the constitutional requirement of a uniform rule for naturalization mandated by U.S. Const. Art. I, § 8, Cl. 4. Thus a permanent resident convicted of an aggravated felony on or after November 29, 1990 can never establish good moral character for naturalization. *See* 8 U.S.C. § 1101(f)(8). Yet, under the Circuit split, aliens with convictions such as that at issue here would be eligible for naturalization in the First and Ninth Circuits but not in the Second, Seventh or Eleventh, creating precisely the non-uniform rules on naturalization that the Framers sought to avoid.

In addition, this split creates divergent standards for punishment under 8 U.S.C. § 1326(b)(2) (re-entry after conviction of an aggravated felony), a matter of no small moment given the fact that the current sentencing enhancements under the Sentencing Guidelines provide for at least an eight level enhancement and a maximum term of 20 years. *See* U.S.S.G. § 2L1.2(b)(1)(C). Indeed, this divergence unfairly creates significantly different penalties depending upon the accidents of geography and has been expressly noted in *United States v. Baza-Martinez*, 464 F.3d 1010 (9th Cir. 2006), which involves a conviction under the very same North Carolina statute at issue here. Finally, this recognized Circuit split on an aggravated felony definition is certainly on a par with

Circuit splits over the meaning of aggravated felony that led to the grant of certiorari in *Lopez v. Gonzales*, 549 U.S. 47 (2006) and *Leocal v. Ashcroft*, 543 U.S. 1 (2004) or divergence on criminal matters in the immigration context that led to the grant of certiorari in *United States v. Flores-Figueroa*, 274 Fed. Appx. 501, 2008 U.S. App. LEXIS 8759 (8th Cir. 2008), *cert. granted*, 2008 U.S. LEXIS 7827 (Oct. 20, 2008).

In addition, the decision below overlooked the longstanding rule of lenity or narrow construction dating back to *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) and most recently reaffirmed by this Court in *Leocal*, 543 U.S at 12 n.8 by which any ambiguity in a deportation provision is to be resolved in the alien's favor given the harsh consequences of removal. Moreover this rule is particularly apt here since the deportation provision is also part of a federal criminal statute.

STATEMENT OF THE CASE

A native and citizen of Honduras, Henry Canales was born on November 17, 1985 and became a lawful permanent resident on May 6, 2000 at age 14. His brother, Marine Lance Corporal Rovin Noe Canales-Matamoros has been deployed to Iraq. In the only criminal matter in his entire life, Henry Canales was convicted in North Carolina Superior Court on August 18, 2006 under N.C. Stat. Gen. § 14-202.1 and given a suspended sentence of 16 to 20 months' imprisonment with 24 months probation. This conviction arose out of the young man's consensual relationship with his teenage girlfriend whose father still views Henry

Canales as a decent young man and who has opposed his deportation.

As required by N.C. Stat. Gen. § 15A-1343(b2)(4), the North Carolina Superior Court had to determine whether the offense involved sexual abuse of a minor as that term was used under state law, concluded that this was not the case and did not check the sexual abuse of a minor finding required if sexual abuse of a minor had been involved. *See, e.g., State v. Couser*, 163 N.C. 727, 732, 594 S.E.2d 420, 423 (Ct. Appeals 2004) (sexual abuse under North Carolina law a broad term). In other words, under N.C. Stat. Gen. § 15A-1343(b2)(4) certain special conditions of probation had to be imposed if the offense did involve sexual abuse of a minor. Finding that sexual abuse of a minor was not involved, the Superior Court did not impose those conditions. While serving his probationary sentence without incident, Mr. Canales was taken into custody by United States Immigration & Customs Enforcement ("USICE") on or about February 22, 2007, and then transferred from his home in North Carolina to the Stewart Detention Center in Lumpkin, Georgia.

During removal proceedings in detention, the Immigration Court (Cassidy, J) sustained the sole charge of removability under 8 U.S.C. § 1101(a)(43)(A) and the Petitioner appealed to the Board. On appeal to the BIA, he urged that the Board should overrule *Matter of Rodriguez-Rodriguez*, 22 I & N Dec. 991 (BIA 1999) in which a deeply divided Board with the alien appearing *pro se* had held that 18 U.S.C. § 3509(a)(8), a witness rights statute that did not define any offense, could be used in defining the aggravated felony of

conviction of sexual abuse of a minor[1]. In support of this appeal, the Petitioner cited, among other things, legislative history that had understandably not been brought to the Board's attention by the unrepresented alien. On September 6, 2007 the Board handed down a single member non-precedential decision[2] that affirmed the Immigration Judge and adhered to *Rodriguez-Rodriguez* in continuing to follow 18 U.S.C. § 3509 as a guide to defining sexual abuse of a minor in line with precedent in the Eleventh Circuit. (App. 7a—10a). *See, e.g., Bahar v. Ashcroft*, 264 F.3d 1309 (11th Cir. 2001).

A timely petition for review was filed with the Eleventh Circuit on September 11, 2007, a motions panel of that Court denied a stay on September 20, 2007 and Henry Canales was deported to Honduras on or about October 9, 2007. On July 10, 2008 the Eleventh Circuit issued a decision denying the petition for review.[3] In that

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[1] The alien in *Rodriguez-Rodriguez* had been convicted under Texas Penal Code Ann. §21.08 for indecent exposure and had received the maximum sentence of ten years imprisonment. 22 I & N Dec. at 992.

[2] Only decisions so designated, which this one was not, have precedential value. *See* 8 C.F.R. § 1003.1(g).

[3] Initially, the Eleventh Circuit issued an order on March 26, 2008 dismissing the petition for lack of subject matter jurisdiction, which, under Eleventh Circuit Rule 40-4 would have limited the Petitioner to a motion for reconsider and precluded a petition for rehearing or rehearing *en banc*. By motion under Rule 40-4, the Petitioner argued that under Section 242(a)(2)(D) of the Act, 8 U.S.C. §1252(a)(2)(D), as enacted by the REAL ID Act of 2005, Pub. L. No. 109-13, 119

(Cont'd)

decision the Eleventh Circuit followed *Bahar* in adhering to *Rodriguez-Rodriguez* and sanctioning resort to 18 U.S.C. § 3509 as a guide for defining sexual abuse of a minor. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on August 14, 2008. (App. 14a—15a).

REASONS FOR GRANTING THE PETITION

Certiorari should be granted because the decision below not only conflicts with this Court's precedent on statutory construction but also creates a split among the circuits. *See, e.g., Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 926 (1982) (certiorari granted where opinion below "appears to be inconsistent with prior decisions of this Court."); Supreme Court Rule 10 (conflict among the circuits a basis for certiorari).

A. *A Recognized Circuit Split Exists*

A clear circuit split now exists on whether deportation for conviction of sexual abuse of a minor should be based upon the uniform federal criminal definition of that criminal provision or upon language in a witness protection statute that does not define a

(Cont'd)

Stat. 231 (May 11, 2005)("REAL ID Act"), the Court of Appeals did have jurisdiction to review the purely legal question of whether the Petitioner's offense constituted an aggravated felony and that a petition for rehearing and rehearing *en banc* was proper. The Court of Appeals granted this motion, withdrew the March 26, 2008 order, issued an opinion dated July 10, 2008 denying the petition for review on the merits and entertained the petition for rehearing and rehearing *en banc*.

crime. In the Ninth Circuit the unanimous *en banc* decision in *Estrada* has persuasively held the federal criminal definition to control whether an alien has been convicted of this aggravated felony. Likewise, the First Circuit in *Emile v. INS*, 244 F.3d 183, 186 n.2 (1st Cir. 2001), would appear to fall in line with *Estrada*, in expressing doubt about the relevance of 18 U.S.C. § 3509 and resolving the aggravated felony issue by resort to the federal criminal statute, while noting the dissent in *Rodriguez-Rodriguez*, 22 I & N Dec. at 999—1005 (Guendelsberger, Member), urging adoption of the federal criminal definition. By contrast, the Eleventh Circuit plainly sanctions resort to 18 U.S.C. § 3509 as a guide to defining conviction for sexual abuse of minor as does the Second Circuit in *Mugalli* and the Seventh Circuit in *Lara-Ruiz*. In short, there is now a pronounced split over the controlling rule for imposing what this Court has repeatedly recognized to be a harsh punishment. *See e.g., INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) ("[d]eportation is always a harsh measure"); *Costello v. INS*, 376 U.S. 120, 128 (1964) (deportation is a "drastic measure" where the "stakes are considerable for the individual"); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (deportation may "result . . . in loss of both property and life; or of all that makes life worth living"). Indeed, the severity of harm from deportation rests upon concerns that literally date back to the founding era with no less an authority than James Madison expressly acknowledging the draconian character of deportation ". . . [I]f a banishment of this sort be not a punishment and among the severest of punishments, it will be difficult to imagine a doom to which the name can be applied." James Madison,

"Report on the Alien and Sedition Acts," *Writings* at 623 (Library of America 1999, Jack N. Rakove, ed.). Moreover, the banishment here would effectively last the Petitioner's whole life. *See* 8 U.S.C. § 1182(a)(9)(A)(i) (alien deported for conviction of an aggravated felony may never lawfully return). Indeed, as this Court recognized in *Lopez v. Gonzales*, 549 U.S. 47 (2006) an aggravated felony conviction deprives an alien of virtually all relief from removal even with a brother serving in the United States Marine Corps.

Furthermore, such a pronounced split encourages undesirable forum shopping, especially since the government has the ultimate power to transfer aliens facing removal to detention centers in circuits where the law favors the government. *See, e.g., Rosendo-Ramirez v. INS*, 32 F.3d 1085 (7th Cir. 1994), which notes the government's upper hand on forum choice.[4] In this connection, moreover the circuit split in this case contravenes the Founders' intent embodied in U.S. Const. Art. I, § 8, Cl. 4 to establish a uniform rule of naturalization. *See, e.g., Graham v. Richardson*, 403

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[4] This would be especially true for aliens subject to mandatory detention under 8 U.S.C. §1226(c), as would be the case for all aliens facing removal for conviction of an aggravated felony who had been imprisoned after mandatory detention became effective. *See Demore v. Kim*, 538 U.S. 510 (2003); *Kyei v. INS*, 65 F.3d 279, 284 (2d Cir. 1994) (Court expresses concern about apparent government policy to deny change of venue to alien's residence where alien no longer detained in remote detention facility). Moreover the administrative view is that mandatory detention is triggered even by an arrest, despite a non-custodial sentence at the conclusion of the criminal case. *See Matter of West*, 22 I & N Dec. 1405 (BIA 2000).

U.S. 365, 382 (1971) (holding cited clause imposes an "explicit constitutional requirement" on naturalization eligibility).

In addition, this Circuit split imposes markedly different standards for punishment under 8 U.S.C. § 1326(b)(2) based upon the fortuity of geography. Indeed, this Circuit split has been specifically recognized in the criminal context involving the very same North Carolina statute at issue here. *See, e.g., United States v. Baza-Martinez*, 464 F.3d 1010 (9th Cir. 2006), which holds that a conviction under this statute does not constitute conviction of sexual abuse of a minor and expressly notes the conflict with *Bahar* and *United States v. Izaguire-Flores*, 405 F.3d 270 (5th Cir.), *cert. denied*, 546 U.S. 905 (2005) on this point.

B. *The Decision Below Contravenes Plain Statutory Language*

The decision below contravenes the plain language of the Act in allowing deportation for conviction of an aggravated felony based upon a statute that does not define a crime. In other words, to be deported for conviction of an aggravated felony an alien must, of necessity, be convicted but no one, by definition, can be convicted under 18 U.S.C. § 3509, which does not define a crime. Thus as *Estrada*, 2008 U.S. App. LEXIS 21783 at 8 n.2 persuasively holds,

> Although Congress also defined 'sexual abuse' in 18 U.S.C. § 3509(a)(8), this section does not define a crime, but merely addresses the rights of child victims and witnesses. Since

> 8 U.S.C. § 1101(a)(43)(A) defines a category of crime it is more plausible that Congress intended the 'aggravated felony' of 'sexual abuse of a minor' to incorporate the definition of 'sexual abuse of a minor' in 18 U.S.C. § 2243, which is a criminal statute outlining the elements of the offense, rather than the definition of 'sexual abuse' found in 18 U.S.C. § 3509.

See also Gattem v. Gonzales, 412 F.3d 758, 768 (7th Cir. 2005) (Posner, J., dissenting) (BIA was "[c]asting far afield," in selecting 18 U.S.C. § 3509 because ". . . it is not a statute that criminalizes sexual abuse. Rather, it provides procedural protections for child victims and child witnesses. . . ."); *Rodriguez-Rodriguez*, 22 I & N Dec. at 1000 (Guendelsberger Member, dissenting) ("That section [18 U.S.C. § 3509] is a social welfare provision affording protection to children in a wide variety of situations. We are not here construing a law affording rights, but are determining the extent to which a conviction will be treated as an aggravated felony for purposes of immigration law").

In addition, defining sexual abuse of a minor by reference to the criminal definition, finds further support in the controlling rule of statutory construction, *noscitur a sociis*, which requires matter enumerated in a series to be construed in a similar fashion. Here "sexual abuse of a minor in Section 101(a)(43)(A) follows two other crimes, "murder and rape," in a series and thus should be defined by resort to a criminal definition

not a social welfare statute. *United States v. Williams*, 128 S.Ct. 1830, 1839 (May 19, 2008) ("commonsense canon of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated."); *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) ("... we construe language in its context and in light of the terms surrounding it."); *Singh v. Ashcroft*, 383 F.3d 144, 163 (3d Cir. 2004) (same).

Furthermore, legislative history not brought to the Board's attention by the pro se alien in *Rodriguez-Rodriguez* further supports the holding in *Estrada* and the dissent's conclusion in *Rodriguez-Rodriguez* itself that 18 U.S.C. §§ 2243 and 2246 should provide the operative definition for "sexual abuse of a minor." The omnibus legislation that ultimately produced IIRIRA considered sexual abuse of a minor in another section and used that term as employed in 18 U.S.C. §§ 2243 and 2246. Thus the "Child Pornography Prevention Act of 1996," which was part of the same legislation that yielded IIRIRA, has a specific subsection dealing with sexual abuse of a minor in amending 18 U.S.C. § 2243 to broaden the geographic reach of the provision. *See* Pub. L. 104-208, 110 Stat. 3009-26, 3009-31, Subsection 7(c) ("SEXUAL ABUSE OF A MINOR—Section 2243(a) of title 18, United States Code is amended by inserting "crosses a State line with the intent to engage in a sexual act with a person who has not attained the age of 12 years, or' after 'Whoever.'")[5]. In other words, the legislation that produced IIRIRA made specific reference to sexual abuse of a minor in 18 U.S.C. § 2243

[5] Subsection 7 is separately referred to as the Amber Hagerman Child Protection Act of 1996.

reflecting a clear Congressional awareness of this criminal law definition in the very same legislation that would add this criminal law term of art, "sexual abuse of a minor," to the definition of aggravated felony.

Under standard rules of statutory construction, this strongly suggests that the term should be given the same operative definition in other portions of the same legislation, especially since there is no comparable reference to 18 U.S.C. § 3509(a) in this omnibus enactment. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) ("identical words used in different parts of the same act are intended to have the same meaning."); 2A N. Singer *Sutherland Statutory Construction* ¶ 46:06 at 1922 ("There is a presumption that the same words used in the same act have the same meaning.").

Furthermore, as *Estrada*, 2008 U.S. App. LEXIS 21873 at 24 persuasively holds, no deference should be accorded the majority in *Rodriguez—Rodriguez*, for that decision did not construe the Act and produce a uniform definition of sexual abuse of a minor but instead adopted 18 U.S.C. § 3509(a)(8) as an advisory guideline, one that would be subject to multi-factor analysis on a case by case basis.[6] Furthermore, as *Estrada* soundly

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[6] Indeed, the BIA majority in *Rodriguez-Rodriguez* appeared to engage in just such a multi-factor analysis. Thus once the offense was found to fall within the definition of sexual abuse in this specific subsection of 18 U.S.C. §3509(a), the Board placed particular emphasis upon both the necessary elements of the Texas offense and the severity of the penalty for the crime, expressly noting that the respondent had received the maximum sentence of 10 years. 22 I & N Dec. at 996

(Cont'd)

notes, 2008 U.S. App. LEXIS 21873 at 24-25, such a deficiency in the BIA's analysis runs directly counter to the controlling categorical approach to removability determinations under *Taylor v. United States*, 495 U.S. 575, 599 (1990), which presupposes a uniform generic definition of the removal ground against which the statute of conviction can compared to determine whether the two are congruent. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 128 S.Ct. 815, 818 (2007). Yet as basic geometry teaches, congruence to a designated object cannot be easily measured when that object keeps changing shape.

Moreover, as *Estrada* also recognizes, sexual abuse of a minor represents a criminal law term and indeed one used in determining punishment under a criminal law statute, 8 U.S.C. § 1326(b), subjects over which the Board admittedly has no expertise. *See, e.g., Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J. concurring) (*Chevron* does require judicial deference to executive interpretations of criminal law provisions); *Matter of Carachuri-Rosendo*, 24 I & N Dec. 382, 385 (BIA 2007) ("Our interpretation of criminal statutes is not entitled to deference; instead we owe deference to the meaning of Federal criminal law as determined by the Supreme Court and the Federal circuit courts of appeals."). Thus conviction for sexual abuse of minor forms an integral part of the federal criminal statute

(Cont'd)

("The severity of the penalty for a conviction under the statute demonstrates that Texas considers the crime to be serious. The respondent received the maximum sentence of 10 years' imprisonment.").

punishing illegal reentry and, as with all federal criminal statutes, should be a matter solely for federal court review. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243, 264, 258 (2006). Indeed, for example, in *Leocal*, 543 U.S. at 12 n.8 reversing the Eleventh Circuit on an aggravated felony issue and holding that the immigration and criminal law terms must be consistently interpreted, this Court did not even cite *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837 (1984) or consider deference to the BIA, but rather applied ordinary rules of statutory construction.

Applying the federal criminal law definition of sexual abuse of a minor to this case under the categorical approach makes clear that the Section 101(a)(43)(A) charge should not have been sustained. Under the categorical approach, the full range of conduct covered by the criminal statute must fall within the removal provision for a conviction under that statute to constitute a removable offense, a point acknowledged by the opinion below. *See also Taylor*, 495 U.S. at 602; *Estrada*, 2008 U.S. App. LEXIS 21873 at 6 (quoting from *Navarro-Lopez v. Gonzales*, 503 F.3d 1063, 1067-68 (9th Cir. 2007) (*en banc*), "The categorical approach requires us to make a categorical comparison of the elements of the statute of conviction to the generic definition of [of the crime], and decide whether the conduct proscribed by the [the statute] is broader than, and so does not categorically fall within, this generic definition."); *United States v. Baron-Medina*, 187 F.3d 1344, 1346 (9th Cir. 1999) (state offense ". . . qualifies as 'sexual abuse of a minor' and hence an aggravated felony *if and only if the 'full range of conduct' covered by it falls within the meaning of that term.*") (emphasis supplied).

Turning first to the federal criminal definition of sexual abuse of a minor, 18 U.S.C. § 2243 requires the defendant to have committed a "sexual act" with a minor, which is limited to conduct ranging from actual intercourse to touching of the naked genitalia. *See* 18 U.S.C. § 2246(2)(A)—(D) (defining "sexual act"). By contrast, the North Carolina statute defines a far broader offense that simply does not require such a sexual act to establish a violation. Indeed, the state statute can be violated even by speech. *See, e.g., State v. Every*, 157 N.C. App. 200, 578 S.E.2d 642 (2003). Similarly in *State v. McClees*, 108 N.C. App. 648, 424 S.E.2d 687 (N.C. App. Ct. 1993) the defendant was convicted under this statute by secretly videotaping an undressed minor, even though the video was not disclosed until the youth had reached the age of majority. Furthermore, the North Carolina statute is a strict liability statute in the sense of not allowing a mistake about the age of the minor as a defense unlike the federal statute. *Compare State v. Rhodes*, 321 N.C. 102, 361 S.E.2d 578 (1987) (defendant's knowledge of age of minor not an element of offense) with 18 U.S.C. § 2243(c) (defendant's reasonable though mistaken belief about age of minor constitutes defense). Accordingly, when the federal criminal definition of sexual abuse of minor is applied, conviction under the North Carolina statute will not sustain a charge under Section 101(a)(43)(A).

C. *The Decision Below Overlooked Lenity*

The Court of Appeals also failed to apply the rule of lenity or narrow construction. This controlling rule of construction has both deep roots and modern relevance in immigration law going back to *Fong Haw Tan v.*

Phelan, 333 U.S. 6, 9 (1948) and requires deportation provisions to be narrowly construed so as to give the alien as much protection as possible. Thus in *Tan* this Court rejected an administrative interpretation of a deportation provision, despite recognizing logical support for that view and unanimously resolved the ambiguity in the alien's favor, holding with emphasis upon the severe penalty represented by deportation:

> We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile. (citation omitted). It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, *we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used.*

(emphasis supplied). *See also Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004) (recognizing rule as basis for decision); *INS v. St. Cyr*, 533 U.S. 201 (2001) (reaffirming rule); *Cardoza-Fonseca*, 480 U.S. at, 449 (recognizes the "special canon of statutory construction whereby ambiguities in deportation statutes are to be construed in favor of the alien); 3 C. Gordon, S. Mailman, S. Yale-Loehr, *Immigration Law and Procedure* § 71.01 [6] [b] (deportation statutes must be "strictly construed" and "must be limited to the narrowest compass reasonably

extracted from their language"). The grounding of this rule in the harm to the alien has particular relevance here, for, as the Third Circuit recognized in *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), deportation for conviction of an aggravated felony constitutes a sentence of life-time banishment. *See also Lok v. INS*, 548 F.2d 37, 39 (2d Cir. 1977) (deportation a sanction which in severity surpasses all but the most Draconian).

Moreover, at the very least, the unanimous *en banc* decision in *Estrada* provides strong support for applying the rule of narrow construction or lenity here, especially since both deportation and criminal punishment are at issue here. *See Leocal*, 543 U.S. at 12 n. 8 ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies"). In this connection moreover, the federal criminal definition of sexual abuse of a minor represents a uniform, bright line rule easy to administer under the categorical approach in both the District Courts and Immigration Courts, while avoiding indeterminate multi-factor analysis calculated to produce uneven results at best. Thus in *Lopez*, 127 S.Ct. at 632 this Court reiterated the importance of uniform rules in the immigration context, especially given the criminal aspect in rejecting the government's attempt to base an aggravated felony classification upon the vagaries of state law: "Finally, the Government's reading would render the law of alien removal, see 8 U.S.C. § 1229b(a)(3), and the law of sentencing for illegal reentry into the country, see U.S.S.G. § 2L1.2, dependent on varying state criminal classifications even when Congress has apparently pegged the immigration statutes to the classifications Congress itself chose."

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 10, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-14225
Non-Argument Calendar

BIA No. A46-981-434

HENRY A. CANALES-MATAMOROS,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the Board of Immigration Appeals

(July 10, 2008)

Before TJOFLAT, BLACK and KRAVITCH, Circuit Judges.

PER CURIAM:

Henry Canales-Matamoros ("Matamoros"), a native of Honduras and a lawful permanent resident of the United States, petitions this court for review of the

Appendix A

Board of Immigration Appeals' ("BIA") affirmance of the Immigration Judge's ("IJ") order of removal on the grounds that Matamoros had been convicted of an aggravated felony. Because the BIA correctly determined that the offense qualified as an aggravated felony, we lack jurisdiction to review the removal order. Accordingly, we deny the petition.

Matamoros arrived in the United States in 2000 and became a lawful permanent resident. In 2006, he was convicted in North Carolina of indecent liberties with a child, in violation of N.C. Gen. Stat. § 14-202.1.[1] As a result of this conviction, the Department of Homeland Security issued a notice to appear, charging him with removability under 8 U.S.C. § 1227(a)(2)(A)(iii) on the grounds that his conviction qualified as an aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(A).

At the removal hearing, Matamoros admitted the allegations, and the IJ found Matamoros removable. Matamoros then appealed to the BIA, arguing that under the categorical approach, the entire range of conduct prohibited by the statute must qualify as sexual

---

1. Under N.C. Gen. Stat. § 14-202.1,

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire.

abuse in order to constitute a removable offense. He explained that it was clear that the statute did not qualify because the North Carolina legislature enacted § 15A-1343(b2), which required courts to determine if an offense under § 14-202.1 constituted sexual abuse of a minor, and if every violation of § 14-202.1 qualified as sexual abuse, this second statute would be unnecessary.[2] He also attempted to distinguish *Bahar v. U.S. Att'y Gen.*, 264 F.3d 1309 (11th Cir. 2001), in which this court held that the North Carolina statute under which Matamoros was convicted constituted an aggravated felony. He then argued that the BIA was not bound by — and should overrule — the decision in *Matter of Rodriguez-Rodriguez*, Int. Dec. 3411 (1999) (discussing Texas law prohibiting indecency with a child by exposure) because the Texas statute differed from the North Carolina statute. He urged the BIA to adopt a definition of sexual abuse consistent with that in the federal criminal code 18 U.S.C. § 2243. Finally, he argued that the rule of lenity required the BIA to conclude the offense was not an aggravated felony.

The BIA affirmed the IJ's order of removal, concluding that it was bound by Eleventh Circuit precedent, and the plain language of the North Carolina

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2. Matamoros's argument is misplaced. Section 15A-1343 applies to conditions of probation. Subsection (b2) lists specific terms of probation for those convicted of sexual abuse of a minor. The statute does not require the court to make any specific finding about the conviction. Notably, however, the state court applied the same special conditions listed in this subsection to Matamoros.

statute confirmed that Matamoros's conviction qualified as an aggravated felony. Matamoros now petitions this court for review.

This court must inquire into subject matter jurisdiction *sua sponte* whenever it may be lacking. *See Chacon-Botero v. U.S. Att'y Gen.*, 427 F.3d 954, 956 (11th Cir. 2005). Section 1252(a)(2)(C) provides that "[n]otwithstanding any other provision of law . . . no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section . . . 1227(a)(2)(A)(iii)." 8 U.S.C. § 1252(a)(2)(C). However, "[n]othing in [§ 1252(a)(2)(C)] . . . shall be construed as precluding review of constitutional claims or questions of law." REAL ID Act of 2005, Pub.L. No. 109-13, 119 Stat. 231 (2005) (codified at 8 U.S.C. § 1252(a)(2)(D)). In *Balogun v. U.S. Att'y Gen.*, 425 F.3d 1356, 1359-60 (11th Cir. 2005), this court determined that the question of whether a conviction qualified as an aggravated felony under a different immigration provision was a question of law within the court's jurisdiction. Accordingly, we have subject matter jurisdiction to review Matamoros's claims in his petition that his state conviction was not an aggravated felony for purposes of 8 U.S.C. § 1227(a)(2)(A)(iii). Our review is limited, however, to determining whether Matamoros is an alien who is removable by reason of having committed an aggravated felony. *Bahar*, 264 F.3d at 1311.

An alien who has been convicted of an aggravated felony is removable. 8 U.S.C. § 1227(a)(2)(A)(iii).

Relevant to this case, aggravated felony is defined as, *inter alia*, sexual abuse of a minor. 8 U.S.C. § 1101(a)(43)(A).

Our conclusion is dictated by *Bahar*, in which this court considered the statute at issue here and determined that the crime defined by § 14-202.1 of the North Carolina General Statute qualified as "sexual abuse of a minor" if the "full range of conduct" covered by the statute fell within the meaning of the term. 264 F.3d at 1311. Relying on the plain meaning of the term "sexual abuse of a minor," this court concluded that the term "includes not only acts that involve physical contact between the perpetrator and the victim, but also acts do not." *Bahar*, 264 F.3d at 1311. In reaching this decision, the court considered the BIA's decision in *Rodriguez-Rodriguez* and found the decision reasonable and thus entitled to deference. *Id.* at 1312.

As the government notes, we are bound by decisions of prior panels until overruled by this court sitting *en banc* or by the Supreme Court. *United States v. King*, 509 F.3d 1338, 1343 (11th Cir. 2007); *Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998). Thus, *Bahar* controls, and the BIA properly determined that Matamoros was removable for having committed an aggravated felony. Moreover, the fact that Matamoros raises arguments not considered in the prior decision is irrelevant to the application of the prior panel rule. *See, e.g., Saxton v. ACF Indus.*, 239 F.3d 1209, 1215 (11th Cir. 2001) (noting "that holding [of the earlier panel] is

the law of this Circuit regardless of what might have happened had other arguments been made to the panel that decided the issue first") (citation omitted).

Finally, although this court retains jurisdiction to consider constitutional questions such as Matamoros's due process claim, Matamoros is not entitled to relief. The BIA implicitly considered his argument that *Rodriguez-Rodriguez* should be overruled when it determined that it was bound by this court's decision in *Bahar*. Moreover, it appears that Matamoros only couches his allegations of error in constitutional language, but he does not raise genuine constitutional violations. As such, this court would lack jurisdiction to reach his issues. *See Arias v. U.S. Att'y Gen.*, 482 F.3d 1281, 1284 (11th Cir. 2007).

Because the BIA properly concluded that Matamoros was an alien who was removable by reason of having committed an aggravated felony, and we lack jurisdiction to review the removal order. Accordingly, we **DENY** the petition.

APPENDIX B — DECISION OF THE BOARD OF IMMIGRATION APPEALS DATED SEPTEMBER 6, 2007

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A46 981 434 - Lumpkin, GA

Date: September 6, 2007

In re.: HENRY *CANALES-MATAMOROS*

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Thomas E. Moseley, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination

The respondent, a native and citizen of Honduras and a lawful permanent resident of the United States, has appealed the Immigration Judge's May 8, 2007,

decision ordering him removed from the United States as an alien convicted of an aggravated felony. On appeal, the respondent claims that the Immigration Judge erred in finding that his conviction for taking indecent liberties with a child, in violation of N.C. GEN. STAT. ANN. § 14-202.1 (West 2006), constitutes the aggravated felony of "sexual abuse of a minor," pursuant to section 101(a)(43)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(A) (2007).[1] For the reasons set out below, the appeal will be dismissed.

In determining whether an offense constitutes an aggravated felony within the meaning of section 101 (a)(43)(A) of the Act, the Board has looked to federal definitions. *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 995 (BIA 1999). The Board has found the definition in 18 U.S.C. § 3509(a) a useful guide in identifying the types of offenses that would constitute sexual abuse of a minor. *Id* at 996. According to this provision, "the term 'sexual abuse' includes the

1. In the respondent's Notice *of* Appeal, he requested suspension of removal proceedings based on his filing of a Petition for Writ of *Habeas Corpus* in the United States District Court for the Northern District of Georgia. As the respondent is now seeking a different form of relief, termination of removal proceedings, on completely different grounds in his brief on appeal, it appears that the respondent is no longer seeking suspension of removal proceedings based on his due process claim in collateral state criminal proceedings. In any event, the Immigration Judge was not obligated to suspend properly-initiated removal proceedings based on a collateral criminal proceeding. Also, the Board does not have jurisdiction to consider whether the respondent is being denied due process in collateral state criminal proceedings. *See* 8 C.F.R. § 1003.1(b), (c).

employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct . . ." "Child" is defined as a person under the age of 18. 18 U.S.C. § 3509(a)(2), (8). Further, the United States Court of Appeals for the Eleventh Circuit, has held that the "ordinary meaning of sexual abuse of a minor includes not only acts that involve physical contact between the perpetrator and the victim, but also acts that do not." *Bahar v. Ashcroft*, 264 F.3d 1309, 1311 (11th Cir. 2001) (internal quotation marks omitted).

In addition, to determine whether an offense qualifies as an aggravated felony, we also apply the categorical approach set out in *Taylor v. United States*, 495 U.S. 575 (1990). That is, we look at the statutory definition of the offense and determine whether the full range of conduct encompassed by the statute, or the generic elements of the offense, would fall within the particular aggravated felony definition.

The offense in question is defined as:

> (a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> > (1) *Willfully* takes or attempts to take any immoral, improper, or indecent liberties with any child of

> either sex under the age of 16 years *for the purpose of arousing or grating sexual desire*; or
>
> (2) *Willfully* commits or attempts to commit any *lewd or lascivious act upon or with the body or any part or member of the body of any child* of either sex under the age of 16 years.

N.C. GEN. STAT. ANN. § 14-202.1 (West 2006) (emphasis added).

The plain language of the North Carolina statute indicates that a violation of the statute necessarily constitutes sexual abuse of a minor. First, the statute requires the victim to be under 16 years of age. Second, the statute requires that the offender has the intent to seek sexual gratification. This is reflected in terms and phrases such as "willfully," "for the purpose of arousing or gratifying sexual desire," and "lewd or lascivious act upon or with the body . . . of any child[.]"[2] Third, the Eleventh Circuit, in whose jurisdiction this case arises, has held that a violation of this North Carolina statute necessarily constitutes sexual abuse of a minor, an aggravated felony as defined in section 101(a)(43)(A) of the Act. *Bahar*, *supra*, at 1312-13.

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2. Black's Law Dictionary defines "lascivious" as "tending to excite lust; lewd; indecent; obscene." *Black's Law Dictionary* 886 (7th ed. 1999)

Appendix B

We find that the respondent's efforts to distinguish *Bahar* from this case are unavailing. Although in *Bahar* the Eleventh Circuit dismissed the case for a lack of jurisdiction, in doing so, it had to determine, *de novo*, that the North Carolina offense of taking indecent liberties with children constitutes an aggravated felony under section 101(a)(43)(A) of the Act. *See Bahar, supra*, at 1311. The respondent also claims that the case at bar is distinguishable from *Bahar* because here the North Carolina court did not check the box in the judgment document indicating that the respondent committed the offense of sexual abuse of a minor. However, we are utilizing the categorical approach in this case, *i.e.*, we are only considering the plain language of the statute, not the underlying documents in the record of conviction. Inasmuch as the Eleventh Circuit, the jurisdiction in which this case arises, has determined that a violation of the North Carolina statute in question constitutes sexual abuse of a minor, we are bound by that determination, not by a state court judge's designation on a form in a state criminal proceeding.[3]

Accordingly, the following order shall be entered:

ORDER: The appeal is dismissed.

s/ Roger Pauley
FOR THE BOARD

3. The respondent relies, in part, on cases arising in state court and federal circuits other than the Eleventh Circuit. These cases have no precedential authority in the Eleventh Circuit.

APPENDIX C — ORAL DECISION OF THE IMMIGRATION JUDGE OF THE UNITED STATES DEPARTMENT OF JUSTICE EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, UNITED STATES IMMIGRATION COURT, ATLANTA, GEORGIA DATED MAY 8, 2007

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
ATLANTA, GEORGIA

May 8, 2007

File No.: A 46 981 434

IN REMOVAL PROCEEDINGS

In the Matter of

HENRY A. CANALES MATAMOROS

Respondent

CHARGE:

APPLICATIONS:

ON BEHALF OF RESPONDENT: Mr. Matos

ON BEHALF OF DHS: Mele Moreno

Appendix C

ORAL DECISION OF THE IMMIGRATION JUDGE

On the basis of respondent's admission, the Court finds removability has been established by clear, convincing and unequivocal evidence. Respondent is not a native or citizen of the United States, but a native and citizen of Honduras who became a lawful permanent resident in May 6, 2000; however, he was convicted of indecent liberties with a child August 18, 2006. As such, the respondent is removable as an aggravated felon as that term is defined under 101(a)(43)(A).

The respondent has requested the relief of voluntary departure. Of course, the respondent is not statutorily eligible for voluntary departure due to the aggravated felony.

ORDER

The respondent is hereby ordered removed, returned to Honduras, the country of nativity and citizenship on the charge contained in the Notice to Appear.

WILLIAM A. CASSIDY
Immigration Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED AUGUST 14, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-14225

HENRY A. CANALES-MATAMOROS,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the Board of Immigration Appeals

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: TJOFLAT, BLACK and KRAVITCH, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having

requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Phyllis Kravitch
UNITED STATES CIRCUIT JUDGE

No. 08-643

In the Supreme Court of the United States

HENRY A. CANALES-MATAMOROS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Counsel of Record
MICHAEL F. HERTZ
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QUESTION PRESENTED

Whether the North Carolina offense of taking indecent liberties with a child constitutes "sexual abuse of a minor," and therefore qualifies as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(A).

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In the Supreme Court of the United States

No. 08-643

HENRY A. CANALES-MATAMOROS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the *Federal Reporter* but is reprinted in 284 Fed. Appx. 800. The decisions of the Board of Immigration Appeals (Pet. App. 7a-11a) and the immigration judge (Pet. App. 12a-13a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 2008. A petition for rehearing was denied on August 14, 2008 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on November 11, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a native and citizen of Honduras who became a lawful permanent resident of the United States in 2000. Pet. App. 13a.

In 2006, petitioner was convicted of taking indecent liberties with a child in violation of North Carolina law, N.C. Gen. Stat. § 14-202.1 (2007). Pet. App. 9a-10a, 13a. Section 14-202.1 provides, in pertinent part:

> A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or
>
> (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

N.C. Gen. Stat. § 14-202.1(a) (2007). Violation of the indecent liberties statute is a felony. *Id.* §§ 14-202.1(b), 15A-1340.17(c) and (d). Petitioner received a suspended sentence of 16 to 20 months of imprisonment and 24 months of supervised probation. He was also ordered to have no contact with the victim and to complete a sex offender program. Gov't C.A. Br. 6.

2. The Department of Homeland Security (DHS) subsequently commenced removal proceedings against petitioner. DHS charged that petitioner was removable pursuant to 8 U.S.C. 1101(a)(43)(A) and

1227(a)(2)(A)(iii), as an alien convicted of an "aggravated felony," namely, "sexual abuse of a minor." Pet. App. 2a.

Petitioner admitted the allegations, and the immigration judge found him removable as charged. Pet. App. 12a-13a. The Board of Immigration Appeals (BIA) dismissed petitioner's appeal. *Id.* at 7a-11a. The BIA concluded that "[t]he plain language of the North Carolina statute indicates that a violation of the statute necessarily constitutes sexual abuse of a minor," relying on its own prior decision in *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (1997), which held that sexual abuse of a minor is not limited to offenses involving physical contact, and the Eleventh Circuit's decision in *Bahar* v. *Ashcroft*, 264 F.3d 1309 (2001), which held that a violation of the North Carolina indecent liberties statute constitutes an aggravated felony involving sexual abuse of a minor. Pet. App. 10a; *id.* at 8a-11a.

3. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1a-6a. The court concluded that petitioner's challenge to the characterization of his offense as sexual abuse of a minor was foreclosed by *Bahar*. *Id.* at 5a; see *Bahar*, 264 F.3d at 1313.

ARGUMENT

Petitioner renews his contention (Pet. 5-21) that his North Carolina felony conviction for taking indecent liberties with a child does not constitute sexual abuse of a minor under the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43)(A), and therefore does not qualify as an aggravated felony. The court of appeals correctly rejected that contention, and although its reasoning is in tension with the reasoning of a recent Ninth Circuit decision, there is no square conflict. Further review is not warranted.

1. In *Bahar* v. *Ashcroft*, 264 F.3d 1309 (11th Cir. 2001), on which the court below relied (Pet. App. 5a), the court of appeals correctly concluded that the North Carolina offense of taking indecent liberties with a child qualifies as sexual abuse of a minor under Section 1101(a)(43)(A).

a. The court in *Bahar* explained that because "no explicit statutory reference exists in 8 U.S.C. § 1101(a)(43)(A) defining 'sexual abuse of a minor,'" Congress intended "courts to rely on the plain meaning of the term." 264 F.3d at 1311. That plain meaning, the court concluded, reaches "a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification." *Id.* at 1312 (quoting *United States* v. *Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001)). As the court explained, the term is not limited to offenses involving sexual physical contact; in ordinary usage, the term "includes not only acts that involve physical contact between the perpetrator and the victim, but also acts that do not." *Id.* at 1311.

The court thus concluded that the North Carolina statute categorically qualifies as one prohibiting "sexual abuse of a minor," even though it does not require physical contact between the perpetrator and the victim, because it requires that the perpetrator have engaged in an indecent or lewd and lascivious act on a child younger than 16 years (and five years younger than the perpetrator) "willfully" and "for the purposes of arousing or gratifying sexual desire." *Bahar*, 264 F.3d at 1311 (citing N.C. Gen. Stat. § 14-202.1(a)(1)).

b. As the court of appeals in this case noted (Pet. App. 5a), the *Bahar* court also correctly considered, and deferred to, the BIA's interpretation of the term "sexual

abuse of a minor" in *In re Rodriguez-Rodriguez*, 22 I. & N. Dec. 991 (1999).

In *Rodriguez-Rodriguez*, the BIA held that the Texas offense of indecency with a child by exposure constitutes sexual abuse of a minor, even though it does not require physical contact between the perpetrator and the victim. 22 I. & N. Dec. at 996. The BIA rejected the argument that the term "sexual abuse of a minor" in the INA implicitly incorporates the definition of the terms "sexual abuse" and "sexual abuse of a minor or ward" in the federal crimes described in 18 U.S.C. 2242 and 2243, which require either a "sexual act" or "sexual contact," terms defined in the statute to refer to physical contact with specific body parts of the victim. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996; see 18 U.S.C. 2246(2) and (3). The BIA explained that, because Congress did not explicitly cross-reference any provision of federal law in Section 1101(a)(43)(A), the BIA was "not obliged to adopt a federal or state statutory provision" to supply the definition of sexual abuse of a minor. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 994. The BIA further explained that, because "states categorize and define sex crimes against children in many different ways," the definitions of the federal offenses in Sections 2242 and 2243 were "too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse and the diverse types of conduct that would fit within the term as it commonly is used." *Id.* at 996.

The BIA noted, however, that a different provision of federal law, 18 U.S.C. 3509(a), which concerns procedural protections for child victims and witnesses, defines "sexual abuse" more broadly: that is, as "the employment, use, persuasion, inducement, enticement, or coer-

cion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children." *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995 (quoting 18 U.S.C. 3509(a)(8)). That definition, the BIA noted, is more consistent with the dictionary definition of "sexual abuse," which "suggests that the common usage of the term includes a broad range of maltreatment of a sexual nature, and * * * does not indicate that contact is a limiting factor." *Id.* at 996 (citing *Black's Law Dictionary* 1375 (6th ed. 1990)). The BIA thus identified Section 3509(a)(8) as "a useful identification of the forms of sexual abuse" covered by Section 1101(a)(43)(A), and concluded that "sexual abuse of a minor" under Section 1101(a)(43)(A) does not require proof of physical contact with the victim. *Id.* at 995-996.

The BIA's construction of the term "sexual abuse of a minor" as it appears in the INA is reasonable, and thus entitled to deference under *Chevron USA Inc.* v. *NRDC*, 467 U.S. 837 (1984). See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999).

2. Petitioner contends (Pet. 13-19) that the "decision below contravenes the plain language of the [INA]" because it "allow[s] deportation for conviction of an aggravated felony based upon a statute that does not define a crime," namely, 18 U.S.C. 3509. Petitioner further contends that the court should have applied the federal criminal definition of "sexual abuse of a minor" in 18 U.S.C. 2243, which, unlike the North Carolina indecent liberties statute, requires proof of a "sexual act," a term defined to mean various forms of direct genital contact, 18 U.S.C. 2246(2), and allows defendants to raise a

mistake-of-age defense, 18 U.S.C. 2243(c). Petitioner's contentions are incorrect.

a. As an initial matter, neither the decision below nor the court of appeals' earlier decision in *Bahar* "allow[s] deportation * * * based upon" Section 3509, Pet. 13. The decisions instead rest on the court's conclusion that petitioner's crime falls within the ordinary meaning of the term "sexual abuse of a minor" in Section 1101(a)(43)(A). As the court of appeals correctly concluded, the ordinary meaning of that term is not limited to offenses involving physical contact, much less to offenses involving a "sexual act" as that term is defined in 18 U.S.C. 2246(2). Pet. App. 5a; see *Bahar*, 264 F.3d at 1311.

To be sure, the court of appeals also considered (Pet. App. 5a), and deferred to, the BIA's decision in *Rodriguez-Rodriguez*, which does rely on Section 3509. But the decision in *Rodriguez-Rodriguez* makes clear that the BIA did not consider itself "obliged to adopt [any] federal * * * statutory provision" to supply the definition of "sexual abuse of a minor," nor did it "adopt[] [Section 3509] as a definitive standard or definition." 22 I. & N. Dec. at 994, 996. The BIA instead explained that it looked to Section 3509 as a useful guide to the range of conduct encompassed by the term "sexual abuse of a minor" precisely because Section 3509's definition of "sexual abuse" is consistent with the ordinary meaning of the term. *Id.* at 996; see *Mugalli* v. *Ashcroft*, 258 F.3d 52, 58 (2d Cir. 2001) (agreeing that "the § 3509(a) definition is appropriate not simply because it appears somewhere in the United States Code, but because it is consonant with the generally understood broad meaning of the term 'sexual abuse'").

b. To the extent petitioner presumes (Pet. 13-15) that Section 1101(a)(43)(A) *requires* the BIA and courts to adopt a pre-existing federal criminal definition of "sexual abuse of a minor," petitioner is incorrect. See, *e.g.*, *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 994; see also *id.* at 998 (dissenting opinion of Member Filppu). A number of the subparagraphs of the aggravated felony definition in 8 U.S.C. 1101(a)(43) do explicitly refer to certain federal criminal definitions. See, *e.g.*, 8 U.S.C. 1101(a)(43)(B) ("illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18"); 8 U.S.C. 1101(a)(43)(D) ("an offense described in section 1956 of title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000"); 8 U.S.C. 1101(a)(43)(F) ("a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year"); see also *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995 n.1 (citing additional statutory provisions). Section 1101(a)(43)(A), however, contains no such reference.

Congress's omission of a federal statutory cross-reference in Section 1101(a)(43)(A) is significant. When Congress has intended to incorporate a federal definition of a particular offense, it has done so explicitly. Congress's decision not to do so in Section 1101(a)(43)(A) should be given effect. See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and pur-

posely in the disparate inclusion or exclusion.") (citation omitted).[1]

Practical considerations also weigh strongly against petitioner's proposal that Section 1101(a)(43)(A)'s reference to "sexual abuse of a minor" be confined to the definition of the federal criminal "sexual abuse of a minor" offense under Section 2243. Cf. *United States* v. *Hayes*, No. 07-608 (Feb. 24, 2009), slip op. 10-11. Such an interpretation would mean that only persons convicted of crimes involving direct genital contact would be removable. 18 U.S.C. 2243, 2246(2). It would also have the absurd result of excluding any offense involving a minor under the age of 12. See 18 U.S.C. 2243(a)(1) (defining "sexual abuse of a minor" as a "sexual act" with a person who "has attained the age of 12 years but has not attained the age of 16 years"). Cf. 18 U.S.C. 2241(c) and 2244(c) (punishing offenses involving children younger than 12 years as the distinct federal offenses of "aggra-

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[1] Petitioner notes (Pet. 15-16) that, in the same omnibus appropriations act in which Congress amended Section 1101(a)(43)(A) to include "sexual abuse of a minor" as an "aggravated felony," see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 321, 110 Stat. 3009-627, Congress also enacted the Amber Hagerman Child Protection Act of 1996, Pub. L. No. 104-208, Div. A, Tit. I, § 121(7), 110 Stat. 3009-31, which, among other things, amended 18 U.S.C. 2243 to expand its geographic reach. Petitioner contends (Pet. 16) that the simultaneous enactment of those provisions demonstrates that the Congress that added "sexual abuse of a minor" to the list of removable aggravated felonies was aware of Section 2243. Petitioner further contends (Pet. 15-16) that the enactment history supports the conclusion that 18 U.S.C. 2243 and 2246 "should provide the operative definition for 'sexual abuse of a minor.'" The text of Section 1101(a)(43)(A), however, contains no suggestion that Congress intended to incorporate the Section 2243 definition, and petitioner cites no legislative history indicating that, despite the statute's silence, Congress nevertheless intended that result.

vated sexual abuse" or "abusive sexual contact"). Such a constrained interpretation of Section 1101(a)(43)(A) is "not consistent with Congress' intent to remove aliens who are sexually abusive toward children and to bar them from any relief." *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 996.[2]

c. Petitioner contends (Pet. 16-18) that the court of appeals erred in deferring to the BIA's decision in *Rodriguez-Rodriguez*. That, too, is incorrect.

First, although it is true (see Pet. 16-17) that *Rodriguez-Rodriguez* did not purport to advance a comprehensive construction of the term "sexual abuse of a minor" under Section 1101(a)(43)(A), it did conclusively reject the primary argument petitioner makes here (Pet. 19): that "sexual abuse of a minor" is limited to offenses involving a "sexual act," as that term is defined in 18 U.S.C. 2243 and 2246. See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996. That decision represents a reasonable construction of the statute the BIA administers, and it is entitled to deference. See *Aguirre-Aguirre*, 526 U.S. at 424-425.

Second, although it also is true that the BIA has no authority to interpret criminal law (see Pet. 17-18), Sec-

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[2] Petitioner argues only that Section 1101(a)(43)(A) incorporates the definition of "sexual abuse of a minor" in Section 2243, and does not contend that Section 1101(a)(43)(A) should also be interpreted to encompass the definitions of the federal crimes of "aggravated sexual abuse," 18 U.S.C. 2241; "sexual abuse," 18 U.S.C. 2242; or "abusive sexual contact," 18 U.S.C. 2244. See, *e.g.* Pet. 19. Cf. *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996 (discussing both Sections 2242 and 2243). But even if the term "sexual abuse of a minor" in Section 1101(a)(43)(A) were interpreted to incorporate by reference not only the criminal "sexual abuse of a minor" statute, but the full complement of federal criminal sexual abuse statutes, it would still be considerably narrower than "the term as it commonly is used." *Id.* at 996.

tions 1227(a)(2)(A)(iii) and 1101(a)(43)(A) are not criminal statutes. They are, rather, immigration-law provisions that fall within the scope of the BIA's authority. See *Emile* v. *INS*, 244 F.3d 183, 185 (1st Cir. 2001). Petitioner cites no case to support his contention (Pet. 17-18) that the meaning of the aggravated felony definitions of the INA is beyond the BIA's expertise because a conviction for an "aggravated felony" also subjects a person convicted of unlawful reentry to enhanced sentencing under 8 U.S.C. 1326(b)(2).[3]

d. Finally, petitioner errs in contending (Pet. 19-21) that the decision below overlooked the role of the "rule of lenity" in immigration cases. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (citing "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"). Even in the criminal context, application of the rule of lenity requires more than "[t]he simple existence of some statutory ambiguity"; it requires a "grievous ambiguity" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation

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[3] *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004), is not to the contrary. See Pet. 18. In *Leocal*, this Court considered whether felony driving under the influence qualifies as an aggravated felony "crime of violence" under 8 U.S.C. 1101(a)(43)(F). Unlike Section 1101(a)(43)(A), Section 1101(a)(43)(F) expressly incorporates the federal criminal-law definition of "crime of violence" in 18 U.S.C. 16. See 18 U.S.C. 1101(a)(43)(F) (defining "crime of violence" by reference to 18 U.S.C. 16); *Leocal*, 543 U.S. at 11 n.8 ("Although here we deal with § 16 in the deportation context, § 16 is a criminal statute."). The Court in any event did not consider the BIA's authority to interpret Section 1101(a)(43)(F) because the BIA had affirmed the petitioner's order of removal based solely on the relevant circuit precedent. See *id.* at 5 n.2.

marks and citation omitted). There is no such "grievous ambiguity" in Section 1101(a)(43)(A). Cf. *Taylor* v. *United States*, 495 U.S. 575, 596 (1990) (declining to apply the rule of lenity in case concerning the meaning of "burglary" in the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B)(ii)).

Moreover, in the INA, Congress expressly conferred on the Attorney General the authority to resolve ambiguities in the first instance. See *Aguirre-Aguirre*, 526 U.S. at 424-425; 8 U.S.C. 1103(a)(1). If courts were required to resolve any and all ambiguities in the alien's favor, that would wholly usurp the Attorney General's interpretive authority. A court thus properly considers whether statutory ambiguities should be resolved in favor of the alien only *after* the court has used every interpretative tool at its disposal, including application of deference principles under *Chevron* and *Aguirre-Aguirre*. Cf. *Negusie* v. *Holder*, No. 07-499 (Mar. 3, 2009), slip op. 5 (the "rule of lenity" may be relevant in reviewing agency action for reasonableness, but does not establish that a statute is unambiguous such that deference is unwarranted). In this case, *Chevron* principles foreclose petitioner's primary argument: that any ambiguity in Section 1101(a)(43)(A) must be resolved in favor of requiring that the alien's statute of conviction contain a physical-contact requirement. See *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 995-996.

3. Petitioner contends (Pet. 10-13) that this Court's review is warranted to resolve a conflict of authority between the decision below and decisions of other courts of appeals. The decision below is, however, consistent with the decisions of other courts of appeals that have considered similar questions under Section 1101(a)(43)(A). See, *e.g.*, *Mugalli*, 258 F.3d at 56-60;

Lara-Ruiz v. *INS*, 241 F.3d 934, 939-942 (7th Cir. 2001). And although, as petitioner notes (Pet. 5, 11), the reasoning of the court of appeals' decision is in tension with the reasoning of the Ninth Circuit's recent en banc decision in *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147 (2008), there is no square conflict on any issue raised by this case.

a. In *Estrada-Espinoza*, the Ninth Circuit held that certain state offenses involving sexual acts with a person under the age of 18 do not qualify as sexual abuse of a minor under 8 U.S.C. 1101(a)(43)(A). In reaching that conclusion, the court looked primarily to the definition of "sexual abuse of a minor" in 18 U.S.C. 2243, which, the court explained, requires: "(1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years between the defendant and the minor." *Estrada-Espinoza*, 546 F.3d at 1152. The court concluded that the Section 2243 definition "comports with 'the ordinary, contemporary, and common meaning of the words' of the term," as well as "the contemporary meaning attached to the crime by a majority of the states," which generally reflect an understanding that, "although sexual activity with a younger child is certainly abusive, sexual activity with an older adolescent is not necessarily abusive." *Id.* at 1152-1153, 1155 (citation omitted); see also *id.* at 1153 ("California is joined by only about six other states in criminalizing sexual intercourse between a 21-year-old and someone about to turn 18.").

The Ninth Circuit declined to defer to the BIA's decision in *Rodriguez-Rodriguez*, concluding that "*Chevron* deference does not apply in these circumstances because *Rodriguez-Rodriguez* did not interpret a statute within

the meaning of *Chevron*, but only provided a 'guide' for later interpretation." *Estrada-Espinoza*, 546 F.3d at 1157. In the alternative, the court stated in a footnote that, even if *Chevron* applied, the BIA's interpretation would not warrant deference because "[w]hen Congress has spoken directly to the issue, as it has here, our inquiry is over and *Chevron* deference does not apply." *Id.* at 1157 n.7.

Although petitioner (Pet. 11, 13-14) appears to read the Ninth Circuit's decision to hold that the term "sexual abuse of a minor" in Section 1101(a)(43)(A) incorporates all elements of the Section 2243 definition, including its "sexual act" requirement, the matter is far from clear. The primary question in *Estrada-Espinoza* was whether state offenses that criminalized sexual activity with "someone about to turn 18" were properly characterized as sexual abuse of a minor. 546 F.3d at 1153. And although the court relied on Section 2243 in answering that question, it also emphasized its conclusion that Section 2243's age elements are in accord with the "contemporary meaning" of "sexual abuse of a minor," after reviewing the relevant provisions of the Model Penal Code and various state statutes. *Id.* at 1153-1155.

The Ninth Circuit, notably, did not have occasion in *Estrada-Espinoza* to consider whether the "sexual act" element of Section 2243 similarly reflects the ordinary, contemporary meaning of "sexual abuse of a minor" for purposes of Section 1101(a)(43)(A). The court's own discussion, however, suggests that it does not. In discussing the meaning of the term "sexual abuse," the court cited with approval prior decisions, including the Eleventh Circuit's decision in *Padilla-Reyes*, holding that "abuse" means "physical *or nonphysical* misuse or maltreatment or use or treat[ment] so as to injure, hurt, or

damage." *Estrada-Espinoza*, 546 F.3d at 1153 (quoting *United States* v. *Lopez-Solis*, 447 F.3d 1201, 1207 (9th Cir. 2006), and *Padilla-Reyes*, 247 F.3d at 1163) (emphasis added). That view of the plain meaning of the term "sexual abuse" is considerably broader than the definition of the term "sexual act" in Sections 2243 and 2246. It also suggests that the Ninth Circuit may not consider Section 2243 to supply all elements of the definition of "sexual abuse of a minor" in Section 1101(a)(43)(A).

It is also unclear that, as petitioner contends (Pet. 16), the Ninth Circuit concluded that the BIA's decision in *Rodriguez-Rodriguez* is owed no deference at all under *Chevron*. *Estrada-Espinoza* did not concern the physical-contact argument the BIA addressed in *Rodriguez-Rodriguez*, nor did *Rodriguez-Rodriguez* address the age question raised in *Estrada-Espinoza*. The Ninth Circuit's refusal to accord *Chevron* deference to *Rodriguez-Rodriguez* is thus equally consistent with the unremarkable principle that an agency's decision is owed no deference with respect to questions it does not purport to answer.

In short, although the reasoning of *Estrada-Espinoza* is in tension with the reasoning of the decision below, there is no defined conflict with respect to any question in this case. This Court's intervention therefore is not warranted at this time.

b. Petitioner also contends (Pet. 5-6, 11) that the decision below conflicts with the First Circuit's decision in *Emile*, *supra*. That is incorrect. In *Emile*, the First Circuit upheld as reasonable the Board's decision generally to "regard conduct that * * * would violate the federal sexual abuse statutes, where the victim was a minor, as 'sexual abuse of a minor'" under Section 1101(a)(43)(A). 244 F.3d at 185. In so holding, the court

made clear that "sexual abuse of a minor" is not *limited* to the Section 2243 definition of that term, but at least reaches the conduct proscribed by other federal criminal sexual abuse provisions. *Id.* at 186-187 (citing 18 U.S.C. 2241-2246). And although the court stated that "it is debatable how relevant" the definition of "sexual abuse" in Section 3509(a)(8) may be, *id.* at 186 n.2, the court did not hold that Section 3509(a)(8) is *irrelevant* to the proper interpretation of Section 1101(a)(43)(A), nor did it hold that Section 1101(a)(43)(A) is limited to offenses involving physical contact between the perpetrator and the victim.

c. Finally, petitioner suggests (Pet. 6, 13) that this Court's review is warranted to resolve a conflict regarding Sentencing Guidelines § 2L1.2, which governs sentencing for unlawful reentry in violation of 8 U.S.C. 1326. In support of his contention, petitioner cites the Ninth Circuit's decision in *United States* v. *Baza-Martinez*, 464 F.3d 1010 (2006), in which the court held that a violation of the North Carolina indecent liberties statute does not qualify as "sexual abuse of a minor" that is a "crime of violence" under Sentencing Guidelines § 2L1.2(b)(1)(A)(ii) & comment. (n.1(B)(iii)), because it does not require proof of physical or psychological harm to the victim. *Baza-Martinez*, 464 F.4d at 1017. But notably, the court expressly rejected the primary argument that petitioner advances here, concluding that "physical harm or touching is not required in order for conduct to be abusive." *Ibid.*; see also *id.* at 1015 n.1 ("[W]e have never held that 'sexual abuse of a minor' requires touching.").

In any event, this Court ordinarily does not grant review to resolve issues concerning interpretation of the Sentencing Guidelines because the Sentencing Commis-

sion can amend the Guidelines to eliminate a conflict or correct an error. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). The Commission is charged by Congress with "periodically review[ing] the work of the courts" and making "whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Id.* at 348; see *United States* v. *Booker*, 543 U.S. 220, 263 (2005) ("The Sentencing Commission will continue to collect and study appellate court decisionmaking. It will continue to modify its Guidelines in light of what it learns, thereby encouraging what it finds to be better sentencing practices."). Particularly because the Guidelines are now advisory, see *id.* at 245, whatever disagreements may have arisen with respect to the application of Guidelines § 2L1.2 do not warrant this Court's review. That is especially so in this case, which of course involves the interpretation of the INA, not the Guidelines.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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U.S. ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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PRELIMINARY STATEMENT

Petitioner Henry A. Canales-Matamoros ("Mr. Canales" or "Petitioner") submits this reply in support of his petition for certiorari. A clear conflict among the circuits exists and the government's arguments on the merits should not defeat certiorari.

A. *A Significant Circuit Split Exists*

The government ignores the obvious split among the Circuits presented here over the controlling rule for determining whether an offense falls within 8 U.S.C. §1101(a)(43)(A) (sexual abuse of a minor), a split that makes the Petitioner deportable in the Eleventh Circuit, where the government transferred him for removal proceedings, but not in the Ninth Circuit. In this connection, the unanimous en banc opinion in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1158 (9th Cir. Oct. 20, 2008) could hardly be clearer in expressly holding that, "[i]n sum, we conclude that when Congress added 'sexual abuse of a minor,' to the list of the aggravated felonies in the [Act] it meant 'sexual abuse of a minor' as defined in the federal criminal code." *See also Estrada*, 547 F.3d at 1152 ("Congress has enumerated the elements of the offense of 'sexual abuse of a minor" at 18 U.S.C. §2243."). Moreover, other circuits have had no difficulty in recognizing this explicit holding. *See, e.g., United States v. Osborne*, 551 F.3d 718, 721 (7th Cir., Jan. 5, 2009) (Easterbrook, J.) (describing *Estrada* as holding that " 'sexual abuse of a minor' in immigration law means a state offense that would be a crime under [18 U.S.C. §2243]."). Furthermore, subsequent decisions from the Ninth Circuit have not retreated from this broad holding

adopting the federal criminal definition of sexual abuse of a minor nor have subsequent decisions read *Estrada* as somehow limited based upon the age of the alleged victim, despite the government's erroneous suggestion to the contrary. Brief for the Respondent in Opposition ("Opp.") at 13-14. *See, e.g., Arriaga v. Mukasey*, 2009 U.S. App. LEXIS 2353 (9th Cir., Jan. 13, 2009) (federal criminal definition of sexual abuse of a minor applied to reject aggravated felony charge in case involving thirteen year old).

By contrast, the Eleventh Circuit has expressly rejected adoption of the federal criminal definition of sexual abuse of a minor under 8 U.S.C. §1101(a)(43)(A). Accordingly, this case presents a clear conflict between the Eleventh Circuit and Ninth Circuit on at least two levels. First, *Bahar v. Ashcroft*, 264 F.3d 1309 (11th Cir. 2001), which the decision below held as controlling, defers to *Matter of Rodriguez-Rodriguez*, 22 I & N Dec. 991 (BIA 1999), while *Estrada* accords no deference to this Board precedent. Second, as the government recognizes, Opp. at 4, *Bahar* rests upon *United States v. Padilla-Reyes*, 247 F.3d 1158 (11th Cir. 2001), which expressly refuses to apply the federal criminal law definition of sexual abuse of a minor under 8 U.S.C. §1101(a)(43)(A). *Padilla*, 247 F.3d at 1164 (rejecting argument that federal criminal law definition should control; "Congress did not intend to rely on other statutory provisions for its definition of [sexual abuse of a minor]. . . ."). Yet *Estrada* holds that the federal criminal definition of sexual abuse of a minor does apply under 8 U.S.C. §1101(a)(43)(A).

Thus, in the Ninth Circuit the uniform federal criminal law definition of sexual abuse of a minor controls whether an alien has been convicted of such an offense under 8 U.S.C. §1101(a)(43)(A), but in the Eleventh Circuit, as in the Second and Seventh Circuits, this uniform federal criminal definition does not apply. *See Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001); *Lara-Ruiz v. INS*, 241 F.3d 934 (7th Cir. 2001). Furthermore, that the Ninth and Eleventh Circuits reach such radically divergent results based upon the plain language of the Act makes the conflict no less real, though *Estrada* would seem to have the better of the plain language argument.[1] *See, e.g., Black's Law Dictionary* at 10 (8th ed. 2004) (sexual abuse defined as "An illegal sexual act esp. one performed against a minor by an adult.").

In short, a clearer conflict over the controlling rule of decision could hardly be imagined. Indeed, to say that the views of the Ninth Circuit and the Eleventh Circuit are merely "in tension," Opp. at 3, 15[2], would be akin to

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1. The government can hardly reduce this conflict by reference to dicta in the decision by the panel in *United States v. Baza-Martinez*, 464 F.3d 1010 (9th Cir. 2006), Opp. at 16, for *Baza-Martinez* antedated the unanimous en banc decision in *Estrada*, took care to note that whether touching was required for sexual abuse of a minor presented an open question, and actually held that the same North Carolina statute at issue here did not categorically constitute sexual abuse of a minor because the statute did not require any abusive effect on the victim. 464 F.3d at 1015.

2. Ironically, the government's main brief before this Court in *Nijhawan v. Holder*, Dkt. No. 08-495 all but acknowledges this conflict in pointing out that *Estrada* declined to give deference to the BIA's construction of sexual abuse of a minor. Brief for the Respondent at 49 n.18.

saying that this Court's decision in *Agency Holding Corp. v. Malley Duff & Associates, Inc.*, 483 U.S. 143 (1987) adopting the Clayton Act limitations period (15 U.S.C. §15b) for civil RICO litigation under 18 U.S.C. §1961 *et seq.* is merely "in tension" with other authority relying upon the most appropriate state statute of limitations. Furthermore, the obvious conflict presented here will apply not only in the immigration context but in the criminal sentencing arena as well given the enhancement provided by 8 U.S.C. §1326(b)(2), which turns on whether the alien has been convicted of an aggravated felony. In this connection, moreover, the government errs in seeking to characterize the conflict presented as one with respect to United States Sentencing Guidelines, Opp. at 16-17, which is simply not the case. Instead, the conflict plainly involves 8 U.S.C. §1326(b)(2) itself.

Furthermore, there would also appear to be a conflict with this Court's precedent, especially that requiring resort to the plain language of the statute. *See, e.g., Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004). The plain language of the Act bases deportation upon an alien's having been convicted of an aggravated felony, yet *Rodriguez-Rodriguez* rests upon a social welfare statute that does not define a crime for which one could ever be convicted. *See Emile v. INS*, 244 F.3d 183, 186 n.2 (1st Cir. 2001) ("debatable how relevant [18 U.S.C. §3509(a)(8)] may be. . . . ,"citing dissent in *Rodriguez-Rodriguez.*); *Gattem v. Gonzales*, 412 F.3d 758, 768 (7th Cir. 2005) (Posner, J., dissenting) (BIA was "[c]asting far afield," in selecting 18 U.S.C. §3509 because ". . . it is not a statute that criminalizes sexual abuse. Rather, it provides procedural protections

for child victims and child witnesses. . . ."). Similarly, there would also appear to be conflict with the controlling rule of statutory construction, *noscitur a sociis*, which requires items enumerated in a series to be construed in a similar fashion. *United States v. Williams*, 128 S. Ct. 1830, 1839 (2008); *Begay v. United States*, 128 S. Ct. 1581 (U.S. 2008). Indeed, just as the familiar series of "lions, tigers, and bears," finds meaning by reference to the characteristics of feral animals and not the ASPCA, so too does the series of "murder, rape and sexual abuse of a minor" in 8 U.S.C. §1101(a)(43)(A) find meaning by reference to criminal offenses and not social welfare provisions.

In short, there is both a serious split among the circuits and a divergence from this Court's precedent strongly supporting a grant of certiorari. Likewise, the government's attempt to paper over this conflict by recasting the question presented as limited to the North Carolina statute, Opp. at I, misses the point that the conflict here is over the controlling rule for deciding whether any offense falls within 8 U.S.C. §1101(a)(43)(A).

B. *The Government's Arguments On the Merits Are Immaterial*

Blind to the obvious Circuit split, the government attempts to defeat certiorari by arguing the merits. Yet these flawed contentions provide no cogent basis for declining review in the face of markedly different rules for both removal proceedings and federal criminal sentencing. First, the government urges, Opp. at 8, that resort to a federal criminal definition is appropriate only where Congress has specifically included such a

provision Yet *Estrada*, 546 F.3d at 1156 persuasively answers this contention, holding,

> The fallacy of this argument is apparent upon comprehensive examination of the lists of aggravated felonies. Section 1101(a)(43) includes 21 subsections, some of which cross-reference other statutory provisions, and some of which do not. Significantly, there is a clear distinguishing characteristic between the aggravated felonies that are linked to other statutory provisions and those that are not. Those that refer to a broad category of offenses, using a potentially ambiguous phrase, reference other statutory provisions for clarification. On the other hand, those that refer to a specific crime which is already clearly defined in criminal law have no need for cross-reference. (citations omitted). 'Sexual abuse of a minor' falls into the latter category, because it refers to a specific crime.

Compare Padilla, 247 F.3d at 1164, which reaches a diametrically opposite conclusion.

Second, the government attempts to raise alleged practical concerns with respect to the age definition of the victim in the federal criminal offense of sexual abuse of a minor, even though this case does not present such an instance of a victim under age 12. Opp. at 9. In this connection, moreover, the government fails to note that Congress has provided a much broader ground of deportation in 8 U.S.C. §1227(a)(2)(E) for conviction of "child abuse," ideally suited to filling any perceived gap here. Likewise, reversing the decision below hardly

requires rejection of the persuasive dissent by Board Member Guendelsberger in *Rodriguez-Rodriguez*, 22 I & N Dec. at 1000 that 8 U.S.C. §1101(a)(43)(A) "should be applied in a manner consistent with the federal criminal law definition of 'sexual abuse of a minor' that is set forth at 18 U.S.C. §§2241-2246," which, in the appropriate case, would pick up those provisions dealing with persons under 12 years old. By contrast reliance upon the shifting multi-factor test unleashed by the majority in *Rodriguez-Rodriguez* risks degeneration into subjective post-hoc judgments that fail to provide fair notice of what will result in deportation and enhanced criminal punishment.

With respect to claimed deference under *Chevron USA v. Natural Res. Def. Council*, 467 U.S. 837 (1984), Opp. at 6, *Estrada* persuasively holds that no deference should be accorded the majority in *Rodriguez—Rodriguez*, for that decision did not construe the Act and produce a uniform definition of sexual abuse of a minor but instead adopted 18 U.S.C. §3509(a)(8) as an advisory guideline, one that would be subject to multi-factor analysis on a case by case basis. Furthermore, unlike the limitations upon asylum and withholding of removal in *INS v. Aguirre—Aguirre*, 526 U.S. 415 (1999) and now *Negusie v Holder*, 129 S. Ct. 1159 (Mar. 3, 2009) the provision at issue here is both a deportation ground and part of a federal criminal statute. Thus in both *Lopez v. Gonzales*, 549 U.S. 47 (2006) and *Leocal v. Ashcroft*, 543 U.S. 1 (2004), this Court did not even refer to *Chevron* in deciding aggravated felony issues, even though in *Lopez*, for example, the Board had ruled to the contrary in a precedent decision, *Matter of Yanez*. *See also Leocal*, 543 U.S. at 12 n.8 ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies"). With the Ninth Circuit having held that

the federal criminal definition of sexual abuse of a minor applies and the Eleventh Circuit having rejected this view, there is plainly a "grievous ambiguity," present, even accepting the government's test for applying the rule of lenity at face value, Opp. at 11.

Furthermore, in urging that the Attorney General, and not this Court, should be the ultimate arbiter of ambiguity even for a provision that is both part of a federal criminal statute and a deportation ground is to jettison the rule of lenity altogether and act as though *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9 (1948) had never been decided. *Compare* 3 C. Gordon, S. Mailman, S. Yale-Loehr, *Immigration Law and Procedure* § 71.01 [6] [b] (deportation statutes must be "strictly construed" and "must be limited to the narrowest compass reasonably extracted from their language").

CONCLUSION

The Eleventh Circuit and Ninth Circuit have adopted conflicting rules of decision for determining whether an offense constitutes sexual abuse of a minor under 8 U.S.C. §1101(a)(43)(A). Moreover, this clear conflict extends beyond deportation and also affects a federal criminal statute, 8 U.S.C. §1326(b)(2). Accordingly certiorari should be granted to resolve this significant conflict.

Respectfully submitted,

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